

BOARD FOR PROFESSIONAL & OCCUPATIONAL REGULATION



GUIDELINES FOR THE EVALUATION OF THE NEED TO REGULATE PROFESSIONS AND OCCUPATIONS



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Introduction

The Board for Professional and Occupational Regulation (BPOR) established these guidelines for studying the need for regulation of professions and occupations in order to inform interested parties of the Board's statutory authority and its approach in conducting studies and evaluations. The guidelines were developed as the result of a recognized need by BPOR to document best practices and procedures used by the Board in prior studies. Following review of the Virginia Board for Health Professions *Policies and Procedures for the Evaluation of the Need to Regulate Health Occupations and Professions* (1998), BPOR incorporated portions of that document into these guidelines.

Statutory Authority

§ 54.1-310 of the *Code of Virginia* (*Code*) provides the statutory authority for the Board for Professional and Occupational Regulation (the Board) to study and make recommendations to the General Assembly on the need to regulate professions or occupations and, if so, the degree of regulation that should be imposed.

The Board has the authority to advise the Governor and the Director on matters relating to the regulation of professions and occupations. In addition, the General Assembly may request that the Board conduct a study. The General Assembly is the body empowered to make the final determination of the need for regulation of a profession or occupation. The General Assembly has the authority to enact legislation specifying the profession to be regulated, the degree of regulation to be imposed, and the organizational structure to be used to manage the regulatory program (e.g., board, advisory committee, registry).

The Commonwealth's philosophy on the regulation of professions and occupations is that: ***The occupational property rights of the individual may be abridged only to the degree necessary to protect the public.*** This tenet is clearly stipulated in statute and serves as the Board's overarching philosophy in its approach to all its reviews of professions or occupations:

. . . the right of every person to engage in any lawful profession, trade or occupation of his choice is clearly protected by both the Constitution of the United States and the Constitution of the Commonwealth of Virginia. The Commonwealth cannot abridge such rights except as a reasonable exercise of its police powers when it is clearly found that such abridgement is necessary for the preservation of the health, safety and welfare of the public. (*Code of Virginia* § 54.1-100)

Further statutory guidance is provided in the same *Code* section which states that the following conditions must be met before the state may impose regulation on a profession or occupation:

1. The unregulated practice of a profession or occupation can harm or endanger the health, safety or welfare of the public, and the potential for harm is recognizable and not remote or dependent upon tenuous argument;
2. The practice of the profession or occupation has inherent qualities peculiar to it that distinguish it from ordinary work or labor;
3. The practice of the profession or occupation requires specialized skill or training and the public needs, and will benefit by, assurances of initial and continuing professional and occupational ability; and
4. The public is not effectively protected by other means.

Pursuant to § 54.1-311 of the *Code*, when the Board recommends that a particular profession or occupation be regulated, or that a different degree of regulation should be imposed on a regulated profession or occupation, it shall consider the following degrees of regulation in order:

1. Private civil actions and criminal prosecutions. – Whenever existing common law and statutory causes of civil action or criminal prohibitions are not sufficient to eradicate existing harm or prevent potential harm, the Board may first consider the recommendation of statutory change to provide more strict causes for civil action and criminal prosecution.
2. Inspection and injunction. – Whenever current inspection and injunction procedures are not sufficient to eradicate existing harm, the Board may promulgate regulations consistent with the intent of this chapter to provide more adequate inspection procedures and to specify procedures whereby the appropriate regulatory board may enjoin an activity which is detrimental to the public well-being. The Board may recommend to the appropriate agency of the Commonwealth that such procedures be strengthened or it may recommend statutory changes in order to grant the appropriate state agency the power to provide sufficient inspection and injunction procedures.
3. Registration – Whenever it is necessary to determine the impact of the operation of a profession or occupation on the public, the Board may implement a system of registration.
4. Certification – When the public requires a substantial basis for relying on the professional services of a practitioner, the Board may implement a system of certification.

5. Licensing – Whenever adequate regulation cannot be achieved by means other than licensing, the Board may establish licensing procedures for any particular profession or occupation.

Pursuant to § 54.1-311.B. of the *Code*, in determining the proper degree of regulation, if any, the Board shall determine the following:

1. Whether the practitioner, if unregulated, performs a service for individuals involving a hazard to the public health, safety or welfare.
2. The opinion of a substantial portion of the people who do not practice the particular profession, trade or occupation on the need for regulation.
3. The number of states which have regulatory provisions similar to those proposed.
4. Whether there is sufficient demand for the service for which there is no regulated substitute and this service is required by a substantial portion of the population.
5. Whether the profession or occupation requires high standards of public responsibility, character and performance of each individual engaged in the profession or occupation, as evidenced by established and published codes of ethics.
6. Whether the profession or occupation requires such skill that the public generally is not qualified to select a competent practitioner without some assurance that he has met minimum qualifications.
7. Whether the professional or occupational associations do not adequately protect the public from incompetent, unscrupulous or irresponsible members of the profession or occupation.
8. Whether current laws which pertain to public health, safety and welfare generally are ineffective or inadequate.
9. Whether the characteristics of the profession or occupation make it impractical or impossible to prohibit those practices of the profession or occupation which are detrimental to the public health, safety and welfare.

10. Whether the practitioner performs a service for others which may have a detrimental effect on third parties relying on the expert knowledge of the practitioner.

The Criteria

Based on the principles of professional and occupational regulation established by the General Assembly, the Board has adopted the following criteria to guide evaluations of the need for regulation. (Specific questions for each criteria are contained in the Appendix.)

- 1. Risk for Harm to the Consumer** - The unregulated practice of the profession or occupation will harm or endanger the public health, safety or welfare. The harm is recognizable and not remote or dependent on tenuous argument. The harm results from: (a) practices inherent in the occupation, (b) characteristics of the clients served, (c) the setting or supervisory arrangements for the delivery of services, or (d) from any combination of these factors.
- 2. Specialized Skills and Training** - The practice of the profession or occupation requires specialized education and training, and the public needs assurance of competence.
- 3. Autonomous Practice** - The functions and responsibilities of the practitioner require independent judgment and the members of the occupational group practice autonomously.
- 4. Scope of Practice** - The scope of practice is distinguishable from other licensed, certified and registered professions and occupations.
- 5. Economic Impact** - The economic costs to the public of regulating the occupational group are justified. These costs result from restriction of the supply of practitioners, and the cost of operation of regulatory boards and agencies.
- 6. Alternatives to Regulation** - There are no alternatives to State regulation of the profession or occupation which adequately protect the public. Inspections and injunctions, disclosure requirements, and the strengthening of consumer protection laws and regulations are examples of methods of addressing the risk for public harm that do not require regulation of the occupation or profession.
- 7. Least Restrictive Regulation** - When it is determined that the State regulation of the occupation or profession is necessary, the least restrictive level of occupational regulation consistent with public protection will be recommended to the Governor, the General Assembly and the Director of the Department of Professional and Occupational Regulation.

Application of the Criteria

In the process of evaluating the need for regulation, the criteria are applied differently, depending upon the level of regulation which appears most appropriate for the occupational group. The following outline delineates the characteristics of licensure, certification, and registration and specifies the criteria applicable to each level.

Registration. Registration requires only that an individual file his name, location, and possibly background information with the State. No entry standard is typically established for a registration program.

RISK: Low potential, but consumers need to know that redress is possible.

SKILL & TRAINING: Variable, but can be differentiated for ordinary work and labor.

AUTONOMY: Variable.

APPLICATION OF CRITERIA: Criteria 4, 5 and 6 must be met.

Certification. Certification by the state is also known as "title protection." No scope of practice is reserved to a particular group, but only those individuals who meet certification standards (defined in terms of education and minimum competencies which can be measured) may title or call themselves by the protected title.

RISK: Moderate potential, attributable to the nature of the practice, consumer vulnerability, or practice setting and level of supervision.

SKILL & TRAINING: Specialized; can be differentiated from ordinary work. Candidate must complete specific education or experience requirements.

AUTONOMY: Variable; some independent decision-making; majority of practice actions directed or supervised by others.

SCOPE OF PRACTICE: Definable in enforceable legal terms.

APPLICATION OF CRITERIA: Criteria 1-6 must be met.

Licensure. Licensure confers a monopoly upon a specific profession whose practice is well defined. It is the most restrictive level of occupational regulation. It generally involves the delineation in statute of a scope of practice which is reserved to a select group based upon their possession of unique, identifiable, minimal competencies for safe practice. In this sense, state licensure typically endows a particular occupation or profession with a monopoly in a specified scope of practice.

RISK: High potential, attributable to the nature of the practice.

SKILL & TRAINING: Highly specialized education required.

AUTONOMY: Practices independently with a high degree of autonomy; little or no direct supervision.

SCOPE OF PRACTICE: Definable in enforceable legal terms.

APPLICATION OF THE CRITERIA: Criteria 1 - 6 must be met.

Alternatives to Professional and Occupational Regulation

When a risk or potential risk has been demonstrated but it is not substantiated that licensure, certification, or registration are appropriate remedies, other alternatives may be warranted. These alternatives should always be considered as less restrictive means of addressing the need to adequately protect the public health, safety, and welfare than restricting the occupational property rights of individuals.

Inspections and injunctions, disclosure requirements, and the strengthening of consumer protection laws and regulations are examples of methods for protecting the public that do not require the regulation of specific occupations or professions.

Procedures

The Board has established procedures for the conduct of its studies. These procedures are intended to assist in the fair and equitable assessment of the need to regulate a profession or occupation or to determine the need for changing a current regulatory approach. Three questions are addressed: Who may request a study and how? How is a study conducted? And, What happens to the results?

Who may request a study and how? Requests for the Board to conduct a study may come from a number of sources:

- The General Assembly
 - as a legislative resolution
 - as a request from an individual member,
- The Governor
- The Director of the Department of Professional and Occupational Regulation
- Boards falling under the umbrella of the Department of Professional or Occupational Regulation
- Concerned Members of the Public

For requests from organizations or individuals, the review process commences with a formal letter of intent proposing the study. Because the time required for studies can exceed a year (from request to recommendations), it is important that a contact person or persons be identified in this letter who will provide continuity to the review process. It should be noted that this time

frame does not include consideration of the Board's recommendations by the Governor or General Assembly. Nor does it take into account the extensive work that must be accomplished between the time the General Assembly may enact enabling legislation and the promulgation of regulations which would be required to implement such legislation.

When a request for study is presented to the Board, the Board may agree to go forward, ask for additional information, or decline the request.

How is a study conducted?

If the Board agrees to go forward with the study, a work plan is adopted. The work plan details the background for the study, its scope, and the specific methodology to be employed. Traditional work plans include a comprehensive review of the relevant literature such as:

- Job analyses which abstracts the knowledge, skills, and abilities that define a profession and help distinguish it from related professions;
- Laws and regulations of other jurisdictions;
- Insurance rates and the extent of coverage based upon their actuarial assessment of the risk posed by the insured group. Civil suits, assessments of the type of work and work settings involved in practice, and evaluations of similar professions' claim histories, among other factors are considered; and
- Data commonly used to develop credentialing examinations.

The work plans also provide opportunities for receipt of public comment. In some instances, further information is gathered through Board sponsored surveys of practitioners, other states, or other parties knowledgeable about the issues germane to the profession or occupation.

Job analyses and insurance data were selected to strengthen the Board's evidentiary basis for three reasons. First, they are generally readily available. Most occupations and professions have professionally developed examinations based on job analyses, and most professions have insurance. Second, because they were designed for purposes other than to promote the regulation of the respective profession, these sources are viewed as relatively objective. Third, and most important, they are viewed as providing insight into the level of risk to the consumer.

Job analyses and actuarial risk predictions also assist the Board in having a thorough understanding of what comprises the practice of the profession and the necessary educational and training background required for entry level competency.

After adoption of the work plan by the Board, the matter is referred to staff to conduct the study and prepare a report with recommendations for the Board's review and final recommendations.

What happens to the results?

Once completed, the study report including recommendations is forwarded to the Board. Upon adoption or revision of the report, the Board prepares its report for the consideration of the Director of the Department, the Secretary of Commerce and Trade, the Governor, and the General Assembly.

Once the final draft is approved, the Board or the source of the study shall post the report on the agency's website and disseminate the report to interested parties upon request or as deemed appropriate.

Appendix

QUESTIONS TO BE CONSIDERED FOR THE EVALUATION OF THE NEED FOR REGULATION OF A PROFESSION OR OCCUPATION

A. GENERAL INFORMATION

1. What occupational or professional group is seeking regulation? Identify the name, title, organization name, mailing address, e-mail address and telephone number of the responsible contact person(s) for the organization. (If more than one organization, provide the requested information for each organization.)
2. What is the level or degree of regulation sought?
3. Estimate the number of practitioners (members and nonmembers) in the Commonwealth.
4. Do other organizations also represent practitioners of this occupation/profession in Virginia? If yes, identify the name, title, organization name, mailing address, e-mail address and telephone number of the responsible contact person(s) for each organization.
5. Are there other occupations/professions within the broad occupational grouping? What organization(s) represent these entities? (List those in existence and any that are emerging).
6. For each association or organization listed above, provide the name and contact information of the national organizations with which the state associations are affiliated.

B. QUESTIONS WHICH ADDRESS THE CRITERIA

- 1. Risk for Harm to the Consumer.** The unregulated practice of the profession or occupation will harm or endanger the public health, safety or welfare. The harm is recognizable and not remote or dependent on tenuous argument. The harm results from: (a) practices inherent in the occupation, (b) characteristics of the clients served, (c) the setting or supervisory arrangements for the delivery of services, or (d) from any combination of these factors.
 1. Provide a description of the typical functions performed and services provided by members of this occupational group.
 2. Has the public actually been harmed by unregulated providers or by providers who are regulated in other states? If so, how is the evidence of harm documented (i.e., court case or disciplinary or other administrative action)? Was it physical, emotional, mental, social, or financial?

3. If no evidence of actual harm is available, what aspects of the provider group's practice constitute a potential for harm?
4. To what can the harm be attributed? Elaborate as necessary.
 - lack of skills
 - lack of knowledge
 - lack of ethics
 - lack of supervision
 - practices inherent in the occupation
 - characteristics of the client/patients being served
 - characteristics of the practice setting
 - other (specify)
5. Does a potential for fraud exist because of the inability of the public to make an informed choice in selecting a competent practitioner?
6. Is the public seeking regulation or greater accountability of this group?

2. Specialized Skills and Training. The practice of the profession or occupation requires specialized education and training, and the public needs assurance of competence.

1. What are the educational or training requirements for entry into this occupation? Are these programs accredited? By whom?
 - Are sample curricula available?
 - Are there training programs in Virginia?
2. If no programs exist in Virginia, what information is available on programs elsewhere which prepare practitioners for practice in the Commonwealth? What are the minimum competencies (knowledge, skills, and abilities) required for entry into the profession? How were they derived?
3. Are there national, regional, and/or state examinations available to assess entry-level competency?
 - Who develops and administers the examination?
 - What content domains are tested?
 - Are the examinations psychometrically sound -- in keeping with *The Standards for Educational and Psychological Testing*?
4. Are there requirements and mechanisms for ensuring continuing competence? For

example, are there mandatory education requirements, re-examination, peer review, practice audits, institutional review, practice simulations, or self-assessment models?

5. Why does the public require state assurance of initial and continuing competence? What assurances does the public have already through private credentialing or certification or institutional standards, etc.?
6. Are there recognized or emerging specialties (or levels or classifications) within the occupational grouping? If so,
 - What are these specialties? How are they recognized? (by whom and through what mechanisms – e.g., specialty certification by a national association, society or other organization)?
 - What are the various levels of specialties in terms of the functions or services performed by each?
 - How can the public differentiate among these levels or specialties for classification of practitioners?
 - Is a “generic” regulatory program appropriate, or should classifications (specialties/levels) be regulated separately (e.g., basic licensure with specialty certification)?

3. Autonomous Practice. The functions and responsibilities of the practitioner require independent judgment and the members of the occupational group practice autonomously.

1. Which functions typically performed by this practitioner group are unsupervised, i.e., neither directly monitored nor routinely checked?
 - What proportion of the practitioner’s time is spent in unsupervised activity?
 - Who is legally accountable/liable for acts performed with no supervision?
2. Which functions are performed only under supervision?
 - Is the supervision direct (i.e., the supervisor is on the premises and responsible) or general (i.e., supervisor is responsible but not necessarily on the premises)?
 - Who provides the supervision? How frequently? Where? For what purpose?
 - Who is legally accountable/liable for acts performed under supervision?
 - Is the supervisor a member of a regulated profession (please elaborate)?
 - What is contained in a typical supervisory or collaborative arrangement protocol?
3. Does the practitioner of this occupation supervise others? Describe the nature of this supervision (as in #2 above).

4. What is a typical work setting like, including supervisory arrangements and interaction of the practitioner with other regulated/unregulated occupations and professions?
5. Does this occupational group treat or serve a specific consumer population?
6. Are consumers referred to this occupational group for services? If so, by whom? Describe a typical referral mechanism.
7. Are consumers referred from this occupational group for services? If so, to what practitioners are such referrals made? Describe a typical referral mechanism. How and on what basis are decisions to refer made?

4. Scope of Practice. The scope of practice is distinguishable from other licensed, certified and registered professions and occupations.

1. Which functions of this occupation are similar to those performed by other occupational groups?
 - Which group(s)?
 - Are the other groups regulated by the state?
 - If so, why might the applicant group be considered different?
2. Which functions of this occupation are distinct from other similar occupational groups?
 - Which group(s)?
 - Are the other groups regulated by the state?
3. How will the regulation of this occupational group affect the scope of practice, marketability, and economic status of the other, similar groups (whether regulated or unregulated)?

5. Economic Impact. The economic costs to the public of regulating the occupational group are justified. These costs result from restriction of the supply of practitioners, and the cost of operation of regulatory boards and agencies.

1. What are the range and average incomes of members of this occupational group in the Commonwealth? In adjoining states? Nationally?
2. What are the typical current fees for services provided by this group in the Commonwealth? In adjoining states? Nationally?
3. Is there any evidence that cost for services provided by this occupational group will increase if the group becomes state regulated? In other states, have there been any effects on

fees/salaries attributable to state regulation?

4. Would state regulation of this occupation restrict other groups from providing services given by this group?

- Are any of the other groups able to provide similar care at lower costs?
- How is it that this lower cost is possible?

5. Are there current shortages/oversupplies of practitioners in Virginia? In the region? Nationally?

6. Alternatives to Regulation. There are no alternatives to State regulation of the profession or occupation which adequately protect the public. Inspections and injunctions, disclosure requirements, and the strengthening of consumer protection laws and regulations are examples of methods of addressing the risk for public harm that do not require regulation of the occupation or profession.

1. What laws or regulations currently exist to govern:

- Facilities in which practitioners practice or are employed?
- Standards or practice?

2. Does the occupational group participate in a nongovernmental credentialing program, either thorough a national certifying agency or professional association.

- How are the standards set and enforced in the program?
- What is the extent of participation of practitioners in the program?

3. Does a Code of Ethics exist for this profession?

- What is it?
- Who established the Code?
- How is it enforced?
- Is adherence mandatory?

4. Does any peer group evaluation mechanism exist in Virginia or elsewhere? Elaborate.

5. How is a practitioner disciplined and for what causes? Violation of standards of care? Unprofessional conduct? Other causes?

6. Does any other means exist within the occupational group to protect the consumer from negligence or incompetence (e.g., insurance, review boards that handle complaints)? How are challenges to a practitioner's competency handled?

7. Least Restrictive Regulation - When it is determined that the State regulation of the occupation or profession is necessary, the least restrictive level of occupational regulation consistent with public protection will be recommended to the Governor, the General Assembly and the Director of the Department of Professional and Occupational Regulation.

1. Should the occupation or profession be regulated?
2. If so, what is the most appropriate level of regulation?